Supreme Court, U.S.
FILED

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No.

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In The

Supreme Court of the United States

October Term, 1996

CHRISTOPHER PANGALOS,

Petitioner,

vs.

PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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33 pp

QUESTION PRESENTED FOR REVIEW

Whether under the Americans With Disabilities Act the burden of proof falls on the employee or on the employer regarding the issue of reasonable accommodation, and specifically, whether the burden of proof on whether there is another position within the employer's work force which would reasonably accommodate the employee's disability falls on the employer or the employee.

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The names of all parties to the proceedings in the Court whose judgment is sought to be reviewed here appear in the caption of the case.

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OPINIONS BELOW

The June 30, 1997 Opinion of the Court of Appeals, whose judgment is sought herein to be reviewed is reprinted in the separate Appendix to this Petition at p. 1a. The separate Opinion of the Court of Appeals Sur Petition Rehearing dated July 29, 1997 is reprinted in the Appendix at p. 11a. The prior Opinion of the United States District Court for the Eastern District of Pennsylvania entered on October 16, 1996 at Civil Action No. 96-0167 is reprinted in the separate Appendix of this Petition at p. 3a.

STATEMENT OF JURISDICTION

The Judgment of the Court of Appeals was entered on June 30, 1997. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, RULES AND REGULATIONS INVOLVED

This case involves the Americans With Disabilities Act of 1990, 42 U.S.C. § 12101, *et seq.* ("ADA"). Specifically, the following statutory provisions of the ADA are involved: "no covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment . . ." as used in subsection (a) of this section, the term "discriminate" includes — (5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the

operation of the business of such covered entity. 42 U.S.C. § 12112 (a), (b), (5)(A).

"The term 'reasonable accommodation' may include . . . job restructuring, part time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities." 42 U.S.C. § 12111(9)(B).

Reassignment to a vacant position is also listed as a potential reasonable accommodation. In general, reassignment should be considered only when accommodation within the individual's current position would pose an undue hardship.

An employer should reassign the individual to an equivalent position, in terms of pay, status, etc., if the individual is qualified, and if the position is vacant within a reasonable amount of time. A "reasonable amount of time" should be determined in light of the circumstances. If, for example, a position is to open in the near future, the employer may have a duty to assign the disabled employee to that position, even though no current opening may be available.

An employer may reassign an individual to a lower graded position if there are no accommodations which would enable the employee to remain in the current position and there are no vacant equivalent positions for which the individual is qualified, with or without reasonable accommodation.

The determination of which accommodation is appropriate in a particular situation involves a process in which the employer and employee identify the precise limitations imposed by the

disability and explore potential accommodations that would overcome those limitations. This process is discussed more fully in § 1630.9 Not Making Reasonable Accommodation. 29 C.F.R. Part 1630, § 1630.2(o).

STATEMENT OF THE CASE

This action is brought by petitioner, Christopher Pangalos, under the employment provisions of the Americans With Disabilities Act, 42 U.S.C. § 12101, *et seq*. Mr. Pangalos began employment as a sales and service representative for Prudential Insurance Company of America, respondent, in 1984. Some seven years after commencing employment, Mr. Pangalos developed a disability, ulcerative colitis. Mr. Pangalos began in 1993 to seek reasonable accommodation for his disability.

The record demonstrates that in the summer of 1993 Mr. Pangalos informed his general manager and immediate supervisor, Ari Horowitz, that he had a problem controlling his bowels which consisted of diarrhea and rectal bleeding. Mr. Horowitz's advice to petitioner was to "wear diapers." Mr. Pangalos told Mr. Horowitz that because of his medical condition he did not believe he would be able to go to clients' homes. Mr. Horowitz informed petitioner that he expected petitioner to do his job as he always had done it and that if petitioner was unable to perform all aspects of his job, he should consult Prudential's Disability Unit. Mr. Horowitz took no action of any sort in order to determine whether or not any accommodation would be made for Mr. Pangalos.

Subsequently, petitioner had conversations with Donald Carter, a disability coordinator with respondent, regarding petitioner's need to have access to a bathroom. Mr. Carter informed petitioner that he should quit his job with respondent because respondent would not provide petitioner with

accommodations. Mr. Pangalos, in his discussions with Mr. Carter, advised that, in petitioner's opinion, he would be able to perform his job as a sales agent if he had accommodation. Accommodations suggested by petitioner included revising petitioner's schedule, reassignment to a new position, and being provided with a mobile bathroom with sanitary facilities. Mr. Carter told petitioner that respondent does not make accommodations.

Responding to Mr. Pangalos' repeated requests for placement at another position within Prudential, Mr. Carter, in April 1994, informed petitioner that he was no longer to call him and that it would be Mr. Carter who would call petitioner if and when Mr. Carter located a job for petitioner within Prudential. Petitioner asked Mr. Carter about the existence of job openings and Mr. Carter stated that he would take care of looking into job openings. Mr. Pangalos trusted Mr. Carter to do this. Upon Mr. Carter's request, in April 1994, petitioner sent his resume to Mr. Carter. Mr. Carter had told petitioner that placement at the home office was a possibility. On May 18, 1994 Mr. Carter addressed a letter to petitioner which advised petitioner to inform Prudential if petitioner was in need of accommodation. Petitioner immediately called Mr. Carter and wanted to know why Mr. Carter had sent him that letter since Mr. Carter already knew that petitioner had been requesting an accommodation.

During a subsequent telephone conversation, Mr. Carter again told Mr. Pangalos that Prudential does not provide accommodations. Petitioner advised Mr. Carter that, in his opinion, he was not totally disabled, but that he did have a disability. Petitioner wanted the chance to go to work and to go back to do a job within Prudential other than his sales agent job, or to be given an accommodation so that he could perform his sales agent job.

In May, 1994, Eve Young, an employee of respondent in its Equal Employment Opportunity Unit, examined petitioner's case and after discussing it with a company doctor, determined that petitioner would not be able to perform the essential functions of his regular job duties at that time. Ms. Young was advised by a co-employee of the Equal Employment Opportunity Unit that among Prudential's obligations to provide reasonable accommodation to petitioner was to help him to perform the essential functions of his current position, or, if that was not possible, provide a transfer to a position at the same responsibility and pay, or a transfer to a lower paying position. After receiving this memo, Ms. Young took no further action on behalf of attempting to accommodate Mr. Pangalos until January 1995.

During the months of October 1993, November 1993, February 1994, and January 1995, respondent placed help wanted advertisements for job openings at various locations in the Philadelphia area. These jobs were to be performed in an office setting and were to provide training for qualified applicants. None of these jobs which respondent advertised in the want ads of the *Philadelphia Inquirer* were offered to petitioner. The job positions advertised on February 20, 1994 included the following, "Customer Service: Member Service Representatives – working in our Customer Service Phone Unit. Member Service Representatives respond to Pru-Care members regarding coverage and reimbursement. Previous telephone/ customer service experience a plus." Petitioner's position title with Prudential was Insurance and Financial Services Sales Representative.

The advertisements appearing on January 22, 1995 and February 19, 1995 included the following: "Insurance and Financial Services – Industry renowned training. Advancement Opportunity. Strong marketing support. High earnings potential.

Aggressive expansion program. For more info., call M. Reynolds, 609-882-3500. EOE. The Prudential."

Evidence of record demonstrates that petitioner was qualified for these job openings. Mr. Pangalos testified to his job skills as follows:

> Q: At this point, Mr. Pangalos, what jobs do you think that you're qualified to perform?
>
> A: In the total world?
>
> Q: Yes.
>
> A: I mean, based upon my skill, I have ten years as an insurance rep. Okay. I've done, you know, phone work. I've done sales. I've done marketing. I mean, I've done filing, okay. I've done numerous, you know, different things, customer service reps. I can do a heck of a lot. I mean, insurance agents are definitely not the low men on the totem poles with insurance companies.
>
> * * *
>
> A: Customer service rep. Okay. I mean, you need some data entry, I mean, I'm not the fastest person in the world, but I can do data entry, and whatever slowness I have on that will pick up, you know, pretty quickly, and I can also do customer service and their policies better than, you know, the people they're hiring now.

On the basis of the record evidence, petitioner demonstrated the existence of vacant positions for which he would have been qualified had he been considered for these positions by respondent.

The record demonstrates that respondent did not make reasonable efforts to assist petitioner, did not act in good faith and impeded petitioner's attempts to obtain a vacant position. Mr. Carter, in May 1994, advised petitioner not to continue to call him concerning the prospect of reassignment, but that it would be Mr. Carter who would contact petitioner should the opportunity for reassignment become available. Mr. Pangalos reasonably relied upon Mr. Carter's representation that he would attempt to locate a vacant position. Respondent took no concrete steps to investigate a possible alternative job position until April 1995, more than fifteen months after the first request for accommodation by petitioner. This inaction by respondent, at a minimum, raised a jury question regarding respondent's good faith and non-impediment of petitioner's attempts to locate a vacant position.

On October 16, 1996 the District Court for the Eastern District of Pennsylvania granted defendant summary judgment on petitioner's ADA claim. On June 30, 1997 a panel of the United States Court of Appeals for the Third Circuit affirmed the District Court Opinion. Petitioner filed a Petition for Rehearing *en banc*, which was denied.

The standing ruling of the lower court in this case was based on several grounds. First, it held that petitioner was not disabled because his condition could "readily be remedied surgically." The Third Circuit disavowed that ground, and it cannot serve as a support for the lower court decision. Second, the lower court found that petitioner was not qualified to perform the essential functions of **his position** with respondent. Petitioner did request

a transfer to another position within his capabilities, and a determination that he could not perform **his position** is not dispositive.

The lower court's other ground for its ruling was the absence of a "feasible accommodation" and the offering of respondent of a "reasonable accommodation" to petitioner to perform his job. On this basis, its holding that respondent is not required to transfer petitioner to another position, and its apparent failure to place the burden of proof on respondent with regard to reasonable accommodation, require reversal of the judgment. Had the lower court recognized that a defendant may have a duty to transfer an employee, and had it placed the burden of proof on respondent, petitioner's evidence of respondent's advertising for various positions during the time in question, coupled with petitioner's qualifications and respondent's failure to consider him, would have presented issues of material fact as to whether there was a feasible accommodation, and precluded judgment as a matter of law for respondent.

REASONS FOR GRANTING THE WRIT

The Circuit Courts are split on the issue of who has the burden of proof on reasonable accommodation. Disabled workers are not receiving the benefits of reasonable accommodation that the ADA was meant to provide. The obligation placed on employers to provide disabled employees a reasonable accommodation requires that they bear the burden of proof on determining whether that obligation has been met. It also requires employers to transfer an employee to a vacant position which is within an employee's physical restrictions, and which would enable him to continue to be a productive member of the work force.

A central issue in this case in whether an employer has the

obligation to transfer an employee to another position within his physical restrictions when the employee's disability prevents him from performing his current position. The District Court, affirmed by the Third Circuit, held that an employer has no such obligation. A corollary to that issue, and one that goes to the core of the reasonable accommodation issue, is which party has the burden of proof in determining whether the employer has fulfilled the ADA's mandate of providing reasonable accommodation. By failing to recognize the employer's responsibilities to consider transfer or reassignment, and by failing to place the burden on the employer in determining whether the employer fulfilled its statutory obligations, the Third Circuit has misconstrued the ADA's mandates.

The ADA proscribes discrimination against a qualified individual with a disability because of the disability. 42 U.S.C. § 12112(a). Not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability is discrimination within the meaning of the ADA. 42 U.S.C. § 12112(b)(5)(A). The term reasonable accommodation includes reassignment to a vacant position. 42 U.S.C. § 12111(9)(B), 29 C.F.R. § 1630.2(o)(2)(ii). The lower court's holding that an employer does not have a duty to transfer or reassign, and its failure to place the burden of proof to show reasonable accommodation on the employer, misstates the law and highlights an issue having significant impact for disabled Americans in the work force.

The Supreme Court has never addressed the issue of reasonable accommodation under the ADA. In fact, the Supreme Court has never addressed the mandates of, and obligations imposed upon employers by the ADA. The Circuit Courts are in conflict as to the standards, and burdens, to be placed on litigants in deciding whether an employer's obligation to reasonably accommodate a disabled employee is met.

In *Borkowski v. Valley Central School District*, 63 F.3d 131 (2nd Cir. 1995)[1], the Court noted that:

> Given the rather obscure regulatory language, it is perhaps not surprising that courts have struggled to give content to the terms reasonable accommodation and undue hardship. It is also not surprising, in view of the lack of any direct statutory guidance, that they have found the assignment of the burdens of production and persuasion particularly difficult as to reasonable accommodation.

Id. at 136. The confusion is compounded by the fact that the anti-discrimination obligations of the ADA "are unusual in the context of federal civil rights statutes." *Id.* The ADA "imposes not only a prohibition against discrimination, but also, in appropriate circumstances, a positive obligation to make reasonable accommodation." *Soileau v. Guilford of Maine, Inc.*, 105 F.3d 12, 14 (1st Cir. 1997).

As noted by the Second Circuit in *Borkowski*, the D.C. Circuit places the burden of proof and production on the employee, requiring the employee to show that the accommodation allows her to perform the essential functions of the job in question, and requiring the employee to show that the accommodation is reasonable in terms of the burdens that are placed on employers. *Borkowski*, 63 F.3d at 136 (citations

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1. *Borkowski*, and many of the cases cited below, address the issue of reasonable accommodation under the Rehabilitation Act. However, the obligation imposed by the ADA and the Rehabilitation Act regarding reasonable accommodation are "equivalent." *Borkowski*, 63 F.3d at 137; *see also Stone v. City of Mount Vernon*, 118 F.3d 92 (2nd Cir. 1997).

omitted). The Eleventh Circuit follows the D.C. Circuit's approach. *See Willis v. Conopco, Inc.*, 108 F.3d 282, at 284-85 (11th Cir. 1997).

The Fifth and Ninth Circuits place the burden of proof on the employer, and under their analysis the employer bears the initial burden of production to present evidence that indicates reasonable accommodation of the employee would not be possible, and places the ultimate burden of persuasion regarding reasonable accommodation on the employer. *See Mantolete v. Bolger*, 767 F.2d 1416, 1423-24 (9th Cir. 1985); *Prewitt v. U.S. Postal Service*, 662 F.2d 292 (5th Cir. Unit A 1981).

The Second Circuit takes what it describes as "a middle course," which places the burden of production on the employee, and the burden of proof on the employer. *Borkowski*, 63 F.3d at 137; *Stone*, 118 F.2d at 98 (ADA case). The Second Circuit places the burden of production on the employee to show that he can perform the job at issue either with or without a reasonable accommodation, and deems the employee to have met this burden when he presents evidence of his individual capabilities and of suggestions for some reasonable assistance or job modification by the employer. *Gilbert v. Frank*, 949 F.2d 637, 642 (2nd Cir. 1991). The burden then shifts to the employer to show that no reasonable accommodation is possible. *Id.*

The Seventh Circuit has taken yet a different approach. In *Beck v. University of Wisconsin Board of Regents*, 75 F.3d 1130 (7th Cir. 1996), the Court described the duty of the parties to engage in an "interactive process," and noted that:

> No hard and fast rule will suffice, because neither party should be able to cause a breakdown in the process for the purpose of either avoiding or inflicting liability. Rather,

> courts should look for signs of failure to participate in good faith or failure by one of the parties to make reasonable efforts to help the other party determine what specific accommodations are necessary. A party that obstructs or delays the interactive process is not acting in good faith. A party that fails to communicate, by way of initiation or response, may also be acting in bad faith. In essence, courts should attempt to isolate the cause of the breakdown and then assign responsibility.

Beck, 75 F.3d at 1135. Subsequent to *Beck*, the Seventh Circuit has effectively split the burden of proof by holding that "the burden was on both [employer] and [employee] to engage in the interactive process." *Bultemeyer v. Fort Wayne Community Schools*, 100 F.3d 1281, 1286 (7th Cir. 1996).

The Third Circuit has adopted a hybrid approach which incorporates the "interactive process" analysis of *Beck*. Specifically, in the context of a request for reassignment or transfer, the Third Circuit places the burden on the employee to demonstrate that there were vacant funded positions whose essential duties he was capable of performing. *Mengine v. Runyon*, 114 F.3d 415, 419 (3rd Cir. 1997) (Rehab. Act case). The Third Circuit places this burden on the employee despite noting that in many cases "an employee will not have the ability or the resources to identify a vacant position absent participation by the employer." *Id.* at 420. The Third Circuit then adopted the "interactive process" approach of *Beck*, and stated that "if an employer fails to engage in the interactive process, it may not discover a way in which the employee's disability could have been reasonably accommodated, thereby risking violation of the Rehabilitation Act." *Id.* at 420-21.

The ADA and Rehabilitation Acts are unique among federal anti-discrimination statutes in mandating not only a prohibition against discrimination against certain classes, but also a positive obligation that an employer take action, over and beyond that which is required for others, to reasonably accommodate an employee with a disability. The Circuit Courts have recognized this distinction by noting the difference between a typical disparate treatment case under the ADA (*e.g.*, a claim that an individual was fired because of a disability), which would invoke the burden shifting analysis examined by this Court in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), and a reasonable accommodation case, which would not be subject to the same burden shifting analysis. *See Bultemeyer*, 100 F.3d at 1283-84.

The split in the Circuit Courts on the burden of proof in a reasonable accommodation case requires guidance from this Court. This case shows why such guidance is necessary. In the situation of a request by a disabled employee for a transfer to another position, the allocation of the burden of proof becomes of critical importance in light of the employer's greater access to information regarding vacant openings within its work force. *Cf. Gilbert*, 949 F.2d at 642 (in light of the goals of the Rehabilitation Act and the greater access of the employer to information regarding the feasibility of various possible job modifications, the employer is given the ultimate burden of proof on the issue of reasonable accommodation). To require the disabled employee to bear the burden of identifying specific available positions in a large corporation with offices throughout the country would effectively eviscerate the employer's obligation to provide reasonable accommodation. The employer could, as in this case, discourage an employee's efforts to seek another position, or bar the employee access to documents which would enable him to identify other positions, and make the reasonable accommodation of a transfer impossible.

In this case, petitioner requested various accommodations, including requests for placement into another position. Petitioner had discussions with Donald Carter, respondent's disability coordinator, about finding another position, and was told that he should not contact Carter, but would be contacted by Carter if and when Carter located a job for petitioner with respondent. Petitioner asked Carter about job openings, and Carter said he would look into them. Upon subsequent contact, after petitioner had not been informed of any openings, Carter flat out told petitioner that Prudential does not provide accommodations.

During the time period petitioner was requesting accommodation, respondent was running ads in the local paper for a variety of positions. Petitioner, who had worked as a sales and service representative for respondent for many years, had transferrable skills which qualified him for these entry level positions. Yet respondent did not consider petitioner for any of these positions. On this record, with the burden of proof on reasonable accommodation properly allocated to respondent, summary judgment should not have been entered.

An employer with a large work force, and a need for employees to fill numerous vacant positions (as evidenced on this record by respondent's advertisements), must be charged with the obligation, in meeting the ADA's mandate of reasonable accommodation, of identifying — and offering — to a disabled employee a position within his restriction. The Third Circuit's failure to charge respondent with that obligation, and to place the burden of proof on respondent, worked an injustice contrary to the mandate, and spirit of the ADA. Furthermore, the confusion and split of the Circuit Courts on the issue of reasonable accommodation, and the duty to identify transfer opportunities or vacant positions within the employee's capabilities, require that this Court clarify the ADA's requirement of reasonable accommodation, and insure that disabled workers

in our nation's work force receive the protection the ADA was intended to afford.

It is respectfully requested that certiorari be granted.

CONCLUSION

Wherefore, petitioner respectfully prays that a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A — JUDGMENT ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED JUNE 30, 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-2022

CHRISTOPHER PANGALOS,

Appellant

v.

PRUDENTIAL INSURANCE COMPANY OF AMERICA

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 96-00167)
District Judge: Honorable John P. Fullam

Argued: June 26, 1997

BEFORE: GREENBERG and MCKEE, *Circuit Judges*,
and GREENAWAY*, *District Judge*

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED and ORDERED that the order of the district

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* Honorable Joseph A. Greenaway, Jr., Judge of the United States District Court for the District of New Jersey, sitting by designation.

court entered October 16, 1996, be and is hereby affirmed. This court, however, does not agree with the district court's statement in its Memorandum opinion of October 15, 1996, that "plaintiff is not disabled, because the disabling condition he alleges could readily be remedied surgically."

Costs taxed against appellant.

BY THE COURT:

s/ illegible
Circuit Judge

ATTEST:

s/ P. Douglas Sisk
P. Douglas Sisk, Clerk

DATED: JUN 30 1997

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA ENTERED OCTOBER 16, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 96-0167

CHRISTOPHER PANGALOS

v.

PRUDENTIAL INSURANCE COMPANY OF AMERICA

MEMORANDUM AND ORDER

FULLAM, Sr.J. OCTOBER 15, 1996

Defendant has filed a motion for summary judgment in this action under the Americans With Disabilities Act, 42 U.S.C. § 12101 et seq.

Plaintiff was employed by the defendant as a life-insurance salesman. His territory covered portions of the City of Philadelphia. In 1993, plaintiff was diagnosed as suffering from ulcerative colitis. At that time, his symptoms were particularly severe: Uncontrollable diarrhea, bloody stools, painful hemorrhoids, etc. He therefore took a leave of absence, under Prudential's short-term disability program. In December 1994, his eligibility for short-term disability was about to expire. The medical evidence he submitted at that time showed that he was not eligible for the company's permanent disability program,

but rather was able to return to work. Plaintiff was advised that he would be expected to return to work not later than January 31, 1995, or face the prospect of "out-placement".

Plaintiff appealed the denial of long-term disability benefits, and those benefits continued until his appeal was decided. After his appeal was denied, plaintiff failed to return to work, and was terminated as of May 9, 1995.

Plaintiff asserts that he suffers from a "disability" as defined in the ADA statute; that he is capable of fulfilling all of the functions of the job of insurance salesman, with reasonable accommodations for his disability; and that the defendant failed to make reasonable efforts to accommodate his disability. Plaintiff further asserts that the defendant discriminatorily discharged him because he had complained to the Equal Employment Opportunity Commission about the denial of long-term disability benefits and the alleged failure to accommodate his disability.

According to Plaintiff's evidence, he is subject to attacks of diarrhea which can occur without any advance warning. It is essential that he have ready access to toilet facilities at all times. The condition "flares up" periodically. The longest he has ever gone without an attack of diarrhea has been eight or ten days. He has some degree of control over the situation, in that abstaining from eating solid foods at breakfast and lunchtime makes it less likely that he will have an attack during working hours; but even that solution is not foolproof.

According to plaintiff, the only "cure" for his condition would be to undergo a colostomy (surgical removal of the colon), but he is not willing to consider that drastic alternative.

Appendix B

Plaintiff's job with Prudential necessitated constant travel to the homes of policyholders and prospective policyholders; the job could not be performed from an office.

When plaintiff's short-term disability leave was about to expire, there were discussions between plaintiff and representatives of the defendant concerning the feasibility of accommodating plaintiff's disability. Plaintiff suggested that the defendant might purchase a van or similar vehicle equipped with a bathroom, for plaintiff to use in performing the functions of his job. Plaintiff acknowledged, however, that the cost of such a vehicle would be prohibitive (according to plaintiff, somewhere between $40,000.00 and $100,000.00). The alternative preferred by plaintiff was assignment to a job which did not involve travel.

Under standard company policy, an employee in plaintiff's position could not relocate to another part of the country without prior notice to, and approval by, his superiors. In violation of that policy, plaintiff had moved from Philadelphia to Kentucky, in December, 1994. Among the accommodations discussed with defendant's representatives was plaintiff's suggestion that the defendant establish an office in one of three specified towns in Kentucky, and assign plaintiff to that office. It was plaintiff's belief that, in that part of the country, he could carry out his work with a minimum of travel, because prospective customers would be willing to come to the office to transact business.

The defendant made the following efforts to accommodate plaintiff's problem:

1) An offer to provide a portable toilet which could be installed on a pick-up truck, with a camper body which would also be supplied by defendant, or to provide a portable toilet

which could be installed in a van, if plaintiff would provide the van.

2) A waiver of company rules governing relocations, and arranging to have plaintiff interviewed for various other possible positions with Prudential in the Kentucky area.

3) Fairly extensive efforts to find some other position within the company which plaintiff could fulfill, which would not involve travel.

The defendant refused to purchase and equip a van, because of the cost. The parties were unable to reach an agreement concerning supplying plaintiff with a portable toilet facility. Plaintiff viewed any such accommodation as inadequate unless it included, in addition to a toilet, facilities for washing up. Defendant was willing to provide a portable toilet of the type used by campers, but not a portable bathroom.

The efforts to obtain other employment with Prudential were unavailing and plaintiff was terminated as of May 9, 1995. Plaintiff was offered out-placement services, but did not avail himself of such services.

To qualify as having a "disability" within the meaning of the statute, plaintiff must show that he has a condition which is permanent, or at least of indefinite prospective duration, and that the condition substantially interferes with his ability to perform one or more of his major life activities. On the present record, this is indeed problematic: While sudden onslaughts of diarrhea without advanced warning can plainly be regarded as limiting plaintiff's ability to perform major life functions, the disability could be remedied by surgical treatment. Moreover,

it appears that plaintiff has never seriously considered the possibility that a diaper or other special undergarment might well provide an adequate solution to the difficulty. (In his deposition testimony, plaintiff took the position that a diaper or similar special undergarment would be too uncomfortable because he would be forced to sit in his own excrement, would develop rashes, etc. Plaintiff testified further, however, that he frequently finds it necessary to keep a plastic bag in his automobile, to protect the upholstery; and that his clothing frequently becomes visibly stained and repulsive. The possibility of using a sanitary undergarment as a brief, temporary solution for emergencies does not seem to have been entertained.)

The defendant is not required to modify the actual duties of plaintiff's job in order to accommodate his disability. 29 C.F.R. part 1630, APP. § 1630.2(o); *Myers v. Hose*, 50 Fed. 3d. 278, 284 (4th Cir. 1995). Neither is the defendant required to create a new position for an employee who cannot perform an essential function of his job. *White v. York, International Corp.*, 45 Fed. 3d. 357, 362 (10th Cir. 1995). And the defendant is not required to transfer plaintiff to another position, *Daugherty v. City of El Paso* 56 Fed. 3d. 695, 699 (5th Cir. 1995).

It is undisputed that plaintiff's job as an insurance salesman (or "marketing representative") required him to spend a large proportion of his time "in the field" — i.e., visiting clients and prospective clients at their homes or offices. This means, in turn, that an essential part of plaintiff's job was the ability to refrain from noticeably befouling himself or his customer's premises.

As noted above, plaintiff testified that the only reliable and permanent cure for his condition would be to undergo a colostomy. If plaintiff were to undergo a successful colostomy,

he would no longer be disabled. If plaintiff's refusal to undergo a colostomy represents a reasonable decision on his part, — and that is, of course, a choice which only he is entitled to make — it follows inevitably that plaintiff is not qualified to perform his job, since he would continue to be subject to sudden onslaughts of diarrhea.

The accommodation suggested by plaintiff (a vehicle with a complete bathroom, protected from freezing in cold weather) and the accommodation offered by the defendant (some kind of portable toilet) differ only in degree; under plaintiff's proposal, it would arguably be more convenient for plaintiff to clean himself after an episode. But the two proposals are alike in that they would, at best, provide only a partial solution to the problem. It seems obvious that, in the course of his sales calls, plaintiff would not always have immediate access to either type of portable facility.

My conclusions are as follows:

1) Either plaintiff is not disabled, because the disabling condition he alleges could readily be remedied surgically, or plaintiff is not qualified to perform the essential duties of his position with the defendant.

2) Either there is no feasible accommodation which would enable plaintiff to perform the essential duties of his job, or the accommodation offered by the defendant is, as a matter of law, easonable. Plaintiff's ADA claim must therefore be dismissed.

The retaliation claim must also fail, if for no other reason than the undisputed fact that plaintiff had been notified of his impending discharge before he complained to the EEOC. On

this record, no rational jury could find that plaintiff was fired for any reason other than his failure to return to work as directed.

Defendant's motion for summary judgment will be granted.

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 96-0167

CHRISTOPHER PANGALOS

v.

PRUDENTIAL INSURANCE COMPANY OF AMERICA

ORDER

AND NOW, this 15th day of OCTOBER, 1996, it is ORDERED: Upon consideration of the defendant's motion for summary judgment, and plaintiff's response, it is ORDERED:

1) Defendant's motion for summary judgment is GRANTED.

2) This action is DISMISSED WITH PREJUDICE.

s/ John P. Fullam
Sr.J.

APPENDIX C — DENIAL OF PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED JULY 29, 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-2022

CHRISTOPHER PANGALOS,

Appellant

v.

PRUDENTIAL INSURANCE COMPANY OF AMERICA

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 96-00167)

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, *Chief Judge*, and BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, and MCKEE, *Circuit Judges*, and GREENAWAY*, *District Judge*

The petition for rehearing filed by the appellant, Christopher Pangalos, in the above captioned matter having been submitted to the judges who participated in the decision of this court and

* Honorable Joseph A. Greenaway, Jr., Judge of the United States District Court for the District of New Jersey, sitting by designation.

to all the other available circuit judges of the court in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied. Judge Mansmann would grant rehearing by the court en banc.

BY THE COURT:

s/ illegible
Circuit Judge

DATED: JUL 29 1997

(2)

Supreme Court, U.S.
FILED
OCT 28 1997
CLERK

No. 97-557

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CHRISTOPHER PANGALOS,

Petitioner,

v.

PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER STATEMENT OF THE QUESTION PRESENTED

Respondent submits that *no* question is presented in this Americans with Disabilities Act case. Judgment was entered for Respondent because Petitioner rejected a reasonable accommodation that he himself requested and acknowledged would permit him to perform his job. This basis for summary judgment for Respondent, which Petitioner has failed to point out to this Court, renders irrelevant the burden of proof issue Petitioner relies on in seeking the instant writ of certiorari.

RULE 29.6 STATEMENT

Respondent Prudential Insurance Company of America has no parent company and the following nonwholly owned subsidiaries:

Prudential Mortgage Asset Corporation I
Prudential of America Life Insurance Company
745 Property Investments

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Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-557

CHRISTOPHER PANGALOS,

Petitioner,

v.

PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent The Prudential Insurance Company of America ("Prudential" or the "Company") respectfully requests that the Court deny the petition for writ of certiorari, seeking review of the judgment of the United States Court of Appeals for the Third Circuit entered on June 30, 1997.

OPINIONS BELOW

The opinion of the Court of Appeals is unpublished. The opinion of the District Court is unpublished, but is available at 1996 WL 612469. The opinions are attached as part of the Appendix to the Petition for Writ of Certiorari at 1a-10a.

JURISDICTION

The Court of Appeals entered its judgment on June 30, 1997. The order of the Court of Appeals denying rehearing was entered on July 29, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

COUNTER STATEMENT OF THE CASE

This Counter Statement of the Case supplements Petitioner's Statement of the Case, which omits and misstates certain important facts.

Mr. Pangalos began his employment with Prudential in 1984 as a sales agent. Sales agents are responsible for marketing and selling a variety of insurance products and for servicing existing clients. These essential functions primarily are performed away from the office in the agent's assigned territory. Mr. Pangalos estimated that ninety percent of his time was spent marketing, selling and servicing insurance products, all of which required work outside an office setting. According to Mr. Pangalos, his position placed him in areas not accessible to restroom facilities over eighty percent of the time.

In September or October of 1993, Mr. Pangalos was diagnosed with ulcerative colitis. This is a chronic condition involving the deterioration of the colon which causes sudden and unpredictable bouts of diarrhea, rectal bleeding and abdominal pain. The condition requires Mr. Pangalos to have almost instantaneous access to toilet facilities. Although he sometimes gets a two or three minute warning of an attack, other times he is forced to have diarrhea in his pants. The only "cure" for this condition is to remove the colon.

After returning from a leave of absence in the fall of 1993, Mr. Pangalos' physician indicated that he could return to work, but needed a bathroom. Efforts to address Mr. Pangalos' needs did not go very far, however, because he was again away from his job and on short-term disability leave beginning in December 1993. At the time he commenced short-term disability leave, Mr. Pangalos told his supervisor, Ari Horowitz, that he was "out sick" and the "doctors have told you I'm not

coming back." Mr. Horowitz did not pursue any further discussions with Mr. Pangalos because he was on disability leave.

Mr. Pangalos remained on short-term disability leave for all of 1994. In April of 1994, Mr. Pangalos purchased a home in Kentucky and moved his family there soon thereafter without notifying Prudential and without requesting a transfer before doing so. In December 1994 and January 1995, Mr. Pangalos was notified that unless he supplied additional medical documentation, he would not qualify for long-term disability benefits and he would be required to return to work.

At that time, Mr. Pangalos discussed with Eve Young, Prudential's Equal Employment representative, his request that Prudential purchase a mobile toilet facility so that he could call on clients. Presumably, when the need arose, he could retreat to his vehicle in order to use those facilities. Mr. Pangalos concluded that some form of mobile toilet facility would allow him to do his job as a sales agent. Mr. Pangalos also requested that Prudential find him another position within the Company, an office position where he could be near a bathroom facility. Mr. Pangalos told Prudential the salary he would be willing to accept and his preference that Prudential open his own sales office for him in Kentucky, where he had moved his family months earlier.

After speaking with Mr. Pangalos, Ms. Young contacted vocational agencies that specialize in solutions to accommodation needs under the Americans with Disabilities Act ("ADA"). Based on the recommendations of these agencies, Prudential offered to purchase and install mobile toilet facilities in Mr. Pangalos' personal vehicle. If Mr. Pangalos' vehicle was not suitable to house such facilities, Prudential offered to reimburse Mr. Pangalos for the costs of a portable toilet. Although such facilities had been requested by Mr. Pangalos because he believed they would permit him to perform his job, he nonetheless told Prudential that this accommodation was unsuitable.

Meanwhile, Prudential was busy seeking other means of accommodating Mr. Pangalos. Although Mr. Pangalos had relocated himself to Kentucky without notice, Prudential

agreed to waive its transfer rules and allow him to seek employment with the Company in the Kentucky area. In addition, Prudential arranged for Mr. Pangalos to interview for a position in Lexington, Kentucky. At the same time, Eve Young mobilized Prudential's Human Resources Department to search for a position. Thereafter, the Human Resources Department contacted numerous field offices in an effort to find Mr. Pangalos a job. Although a few part-time positions were available, Mr. Pangalos' salary requirements made these jobs unacceptable. Further, Ms. Young testified that several positions that were expected to become available were, in fact, never filled because corporate restructuring at Prudential eliminated the need for these positions.

On April 21, 1995, Prudential wrote to Mr. Pangalos and reiterated its offer to provide him with mobile toilet facilities. The letter also informed Mr. Pangalos that he was to contact his supervisor and return to work at the Philadelphia area office no later than May 9, 1995. The letter stated that failure to report to work would result in discharge effective immediately. Mr. Pangalos failed to report to work as directed and was discharged for this reason by letter dated May 10, 1995.

REASONS FOR DENYING THE PETITION

I. The Issue Presented By Petitioner Is Not Raised By The Facts Of This Case.

Petitioner contends that this case presents the question of which party in an ADA action bears the burden of proof on the existence, or non-existence, of a reasonable accommodation, including job reassignment, that would permit the employee to perform the essential functions of his or her job. This issue, however, is not raised in this case because it is uncontroverted that Plaintiff was in fact offered a reasonable accommodation, *viz.* a mobile toilet facility, that he rejected. An employee's rejection of a reasonable accommodation obviates the need to consider the availability of alternative accommodations or who has the burden of locating them. Thus, it is

immaterial whether other types of accommodation, such as reassignment to another position, were available.

An employer fulfills its duties under the ADA when it offers to a qualified individual with a disability a reasonable accommodation that would permit that individual to perform the essential functions of his or her job. 42 U.S.C. § 12112(b)(5)(A); 29 C.F.R. § 1630.2(o) (1996). If the employee subsequently rejects the offered accommodation, the employer cannot be held liable under the ADA. 29 C.F.R. § 1630.9(d) (1996) (stating that an employee who rejects an offered accommodation "will not be considered a qualified individual with a disability"); *see also Schmidt v. Methodist Hosp. of Ind., Inc.*, 89 F.3d 342, 344-45 (CA7 1996) (holding that employee who rejects offered accommodation falls outside ADA's protections); *Hankins v. The Gap, Inc.*, 84 F.3d 797, 801 (CA6 1996) (same); *Willett v. State of Kan.*, 942 F. Supp. 1387, 1394 (D. Kan. 1996) (same), *aff'd mem.*, 120 F.3d 272 (CA10 1997); *Pattison v. Meijer, Inc.*, 897 F. Supp. 1002, 1008 (W.D. Mich. 1995) (same); *Marschand v. Norfolk & W. Ry.Co.*, 876 F. Supp. 1528, 1544 (N.D. Ind. 1995) (same), *aff'd*, 81 F.3d 714 (CA7 1996); *Waite v. Blair, Inc.*, 937 F. Supp. 460, 472 (W.D. Pa. 1995) (same).

In the instant case, Prudential, after conferring with Mr. Pangalos, contacted vocational agencies that specialize in solutions to accommodation needs under the ADA. Based on the recommendations of these agencies, Prudential offered to purchase and install mobile toilet facilities for Mr. Pangalos in his personal vehicle. To the extent that Mr. Pangalos was unable to provide a vehicle suitable to house such facilities, Prudential indicated its willingness to reimburse Mr. Pangalos for the costs of a portable toilet.

Mr. Pangalos acknowledged that having a mobile toilet facility would allow him to do his job as a sales agent. Despite this offer of accommodation, Mr. Pangalos persisted in his efforts to secure the accommodation he preferred, namely the establishment of his own Prudential sales office in Kentucky. Frankly, it is not surprising that Mr. Pangalos chose not to pursue further discussions in 1995 about mobile toilet facilities

for his job in Philadelphia when he had already purchased a home and moved his family to Kentucky in the spring of 1994. However, under the ADA, Prudential was under no obligation to provide Mr. Pangalos with his dream accommodation.[1] *See Hankins,* 84 F.3d at 800 (holding that employer was not obliged to comply with migraine-suffering employee's request for transfer to different department where employer had already offered use of paid and unpaid leave time as reasonable accommodation); *see also* 29 C.F.R. § 1630, App. § 1630.9 (1996) ("[T]he employer providing the accommodation has the ultimate discretion to choose between effective accommodations, and may choose the less expensive accommodation or the accommodation that is easier for it to provide.").

In short, summary judgment was appropriately entered in this case for the simple reason that Mr. Pangalos rejected an accommodation that he himself had requested and acknowledged would permit him to perform his job. This critical fact, noticeably omitted from the instant Petition, renders irrelevant the issue he presents for review, namely which party bears the burden of proof of showing the availability or non-availability of alternative accommodations. That issue need not be addressed once an employee rejects a reasonable accommodation, and, accordingly, the petition for writ of certiorari should be denied.

II. Even If Petitioner's Issue Were Raised In This Case, The Courts Of Appeals Are In Agreement That An ADA Plaintiff Bears The Initial Burden Of Identifying The Proposed Accommodation.

As discussed above, Prudential's offer of a reasonable accommodation obviates the need to consider which party has the burden of showing the existence or non-existence of alternative accommodations. However, even if this issue were raised in the instant action, there is no disagreement among

1. Although it was not required to do so, Prudential did in fact attempt to accommodate Petitioner's desire to work in Kentucky by agreeing to waive its transfer rules and permitting him to interview in Lexington, Kentucky.

the Courts of Appeals that an employee is responsible for first identifying the accommodation, including vacant positions, that he believes would permit him to perform the job.

Only "qualified" individuals with a disability gain the protections of the ADA. 42 U.S.C. § 12112(a). Individuals are "qualified" if they can show that they are able to perform, with or without a reasonable accommodation, the essential functions of the employment position held or desired. 42 U.S.C. § 12111(8). Reasonable accommodation "may include" reassignment to a vacant position. 42 U.S.C. 12111(9).

Following these statutory standards, the Courts of Appeals have consistently and properly concluded that the initial burden is on the plaintiff to establish that he is "qualified" by identifying or describing the desired accommodation. *Willis v. Conopco, Inc.*, 108 F.3d 282, 284-85 (CA11 1997); *Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1481 (CA9 1996); *Monette v. Electronic Data Sys. Corp.*, 90 F.3d 1173, 1187 (CA6 1996); *Shiring v. Runyon*, 90 F.3d 827, 832 (CA3 1996); *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1112 (CA8 1995); *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 138 (CA2 1995); *Barth v. Gelb*, 2 F.3d 1180, 1186 (D.C. 1993), *cert. denied*, 511 U.S. 1030 (1994).[2] In those cases where transfer or reassignment is the desired accommodation, the employee must identify vacant positions the essential functions of which he is capable of performing. *Willis*, 108 F.3d at 286; *Shiring*, 90 F.3d at 832.

Petitioner confuses this initial burden of identifying an accommodation with the burden of showing whether or not it is reasonable. The latter issue is where the Courts of Appeals have disagreed. *See Borkowski*, 63 F.3d at 136-39 (discussing differing approaches to which party bears burden of proof on whether proposed accommodation is reasonable). However,

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2. Although some of these cases were decided under the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.*, their analysis applies to claims brought under the ADA. *See Stone v. City of Mt. Vernon*, 118 F.3d 92, 96 (CA2 1996) (holding that requirements for establishing a *prima facie* case are the same under both statutes); 29 U.S.C. § 794(d) (Rehabilitation Act is to be interpreted in accordance with the standards applied under the ADA).

there is no disagreement that it is the plaintiff who must first describe the proposed accommodation, including the identification of vacant positions, if transfer or reassignment is the desired accommodation. Only after this is done will a court consider whether the proposed accommodation is reasonable (and which party bears the burden on this issue).

In the instant case, Plaintiff failed to identify any vacant positions at Prudential that he was capable of performing. The classified advertisements, which Petitioner presented for the first time, after the close of discovery, at oral argument on Prudential's summary judgment motion, do not satisfy this burden for several reasons. First, three of the five advertisements were listed in 1993 and 1994 when Mr. Pangalos was receiving disability payments from Prudential and unable to work. As for the remaining two advertisements, which do not identify any specific position, Mr. Pangalos offered no evidence on the details of what job was being offered and, more importantly, that he was capable of performing it. *See White v. York Int'l Corp.*, 45 F.3d 357, 362 (CA10 1995) (affirming summary judgment where employee failed to show he was suited for any vacant positions). Despite ample opportunity during discovery, Plaintiff simply was unable to point to any suitable vacant position. In sharp contrast, Prudential offered evidence that it actively searched for a position for Mr. Pangalos, even though it was not obligated to do so after it had made its initial offer to provide him with mobile toilet facilities. Unfortunately, its extensive inquiries turned up no positions for him.

The Courts of Appeals are in agreement that this failure by Petitioner to identify a proposed accommodation — in this case a vacant position — renders him not "qualified" and places him outside the ADA's protections. Thus the issue of the proposed accommodation's reasonableness, on which there is some disagreement among the Courts of Appeals, is not raised in this case. Accordingly, there is no need for this Court's review, and the petition for writ of certiorari should be denied.

CONCLUSION

For the foregoing reasons, Respondent The Prudential Insurance Company of America respectfully submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

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Dated: October 28, 1997

Supreme Court, U.S.
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CLERK

No. 97-557

In The

Supreme Court of the United States

October Term, 1997

CHRISTOPHER PANGALOS,

Petitioner,

vs.

PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER

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FURTHER STATEMENT OF THE CASE

Respondent, in its counterstatement of the case, identifies perceived omissions and misstatements of fact contained in petitioner's original statement of the case.[1] On the contrary, it is respondent's counterstatement of the case that contains allegations of "uncontroverted" fact which are refuted in the record.

Respondent states that it offered to purchase and install mobile toilet facilities in petitioner's personal vehicle. If petitioner's vehicle was not suitable to house such facilities, respondent offered to reimburse petitioner for the cost of a portable toilet. *See* Respondent's Brief in Opposition at p. 3. These statements are subject to refutation in the record in that petitioner testified at his deposition that after he priced a sanitary toilet facility at a cost of $450, this was rejected by respondent as too costly. Petitioner testified that respondent refused to provide a sanitary toilet or wash up facility after being advised that such facility would cost at least $450. Therefore, the statement by respondent in its brief regarding the reasonableness of its offer of accommodation would have been a question of fact for determination by the jury.

Respondent places emphasis upon petitioner's moving to Kentucky in the Spring of 1994. Petitioner testified that this move was necessitated due to his worsening economic situation. Throughout 1994 and 1995 petitioner remained ready, willing, and able to resume employment in the Philadelphia area either

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1. All factual findings upon which the lower court based its decision to grant summary judgment are contained in its Opinion, reprinted as Appendix B to the Petition for Writ of Certiorari. Petitioner has presented to this Honorable Court all relevant facts, both in his Statement of the Case and in the lower court opinion, which are material to the Petition for Writ of Certiorari.

at respondent's home office in Fort Washington, Pennsylvania, or in any other office setting that would provide him with access to bathroom facilities. Throughout petitioner's course of dealings with Donald Carter, Eve Young, and other employees of respondent, he consistently expressed his interest in being transferred to a position which would accommodate his disability. Included among the alternatives was a transfer to the Kentucky area in which petitioner would supply the costs of opening an office as a Prudential Sales Agent. At no time did petitioner reject any offers of transfer in the Philadelphia area or any other part of the United States. In fact, no such offers were made. Petitioner's move to Kentucky was immaterial in terms of his ongoing efforts to secure alternate employment with Prudential. He maintained telephone and written contact with Mr. Carter, Ms. Young, and other employees of respondent throughout the period of time he lived in Kentucky.

Petitioner was on short-term disability leave from late 1993 through calendar year 1994. However, the contractual entitlement of petitioner to short-term disability leave did not affect in any manner respondent's legal obligations under the ADA to provide a reasonable accommodation. Throughout the later part of 1993, and in 1994 and 1995, petitioner had continually asked for reasonable accommodation, including transfer to a job position which could accommodate his disability. Petitioner's entitlement to short-term disability benefits under the terms of his employment contract, does not vitiate respondent's obligation to provide a reasonable accommodation to petitioner as an individual with a disability.

FURTHER REASONS FOR GRANTING THE WRIT

Respondent's argument that the issue presented by petitioner is not raised by the facts of this case is incorrect. This argument states that, ". . . it is uncontroverted that plaintiff was in fact

offered a reasonable accommodation, *viz*, a mobile toilet facility, that he rejected." Respondent's Brief in Opposition, p. 4. In fact, it is a controverted issue as to whether or not respondent offered a reasonable accommodation to petitioner. Petitioner testified at his deposition that once he quoted a price of $450 for a regular sized toilet without sanitary wash up facility, the respondent through Eve Young rejected the prospect as being too costly. Whether or not respondent ever unequivocally offered any sort of mobile or portable toilet facility is a question of disputed fact. Rather, the offer made by respondent was for a camping potty, or portable potty without any sort of wash up facility. As indicated by the lower court in its opinion,

> But the two proposals are alike in that they would, at best, provide only partial solution to the problem. It seems obvious that, in the course of his sales calls, plaintiff would not always have immediate access to either type of portable facility.

Petition for Writ of Certiorari, Appendix B at 8a.

Although the lower court stated as one of its four alternative holdings that respondent had offered a reasonable accommodation, it is apparent from the lower court's discussion of the efficacy of a portable toilet facility, that, in its opinion, it placed greater weight upon its alternative holding that no feasible accommodation existed which would enable petitioner to perform the essential duties of his job.

Therefore, squarely before the lower court was the obligation to consider whether or not transfer to another position would have been a reasonable accommodation. The lower court misstated the law by stating that defendant is not required to transfer plaintiff to another position. Petition for Writ of Certiorari, Appendix B at 7a. Because the lower court failed to

properly consider the availability of transfer as a reasonable accommodation and because it sub silentio placed the burden on petitioner to demonstrate the availability of a vacant position as a reasonable accommodation, the Petition for Writ of Certiorari should be granted.

The split among the circuit courts exists as demonstrated in the Petition. This Court's guidance is necessary to resolve the conflict and to effectuate the remedial purpose of the Americans With Disabilities Act.

CONCLUSION

Wherefore, Petitioner respectfully prays that a Writ of Certiorari be granted.

Respectfully submitted,

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(4)

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

No. 97-557

CHRISTOPHER PANGALOS,
Petitioner,

v.

PRUDENTIAL INSURANCE COMPANY OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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RESPONDENT'S MOTION FOR DAMAGES AND COSTS PURSUANT TO RULE 42.2

Respondent Prudential Insurance Company of America ("Prudential" or the "Company"), by its attorneys, hereby seeks damages and costs against counsel for Petitioner pursuant to Supreme Court Rule 42.2 for the filing of a frivolous petition for writ of certiorari. As discussed in more detail below, counsel for Petitioner omitted several material facts that formed the basis for the decisions of the courts below. As a result, counsel for Petitioner is improperly seeking this Court's review on an issue not raised by this case and has unnecessarily forced Respondent to incur legal fees and costs.

Supreme Court Rule 42.2 sets forth the standards by which a respondent may seek damages and costs for the filing of a frivolous petition for writ of certiorari:

7 DP

> When a petition for a writ of certiorari, an appeal, or an application for other relief is frivolous, the Court may award the respondent or appellee just damages, and single or double costs under Rule 43. Damages or costs may be awarded against the petitioner, appellant, or applicant, against the party's counsel, or against both party and counsel.

Sup. Ct. R. 42.2; *see also* 28 U.S.C. § 1927 (empowering any court of the United States to require an attorney "who so multiplies the proceedings in any case unreasonably and vexatiously . . . to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.")

In the instant case, Petitioner's counsel omitted several facts in the petition that were material to the lower courts' conclusion that Mr. Pangalos could not sustain a claim under the Americans with Disabilities Act ("ADA"). As discussed in more detail in Respondent's brief in opposition to the petition, the most critical of these omissions is the fact that Prudential offered Mr. Pangalos a reasonable accommodation that he requested and that he acknowledged would permit him to perform his job as an insurance salesperson in the Philadelphia area. Mr. Pangalos ultimately rejected this offer, and instead pursued what he considered to be a better accommodation, namely the establishment of his own sales office in Kentucky, where he had moved his family months earlier without informing Prudential. This rejection of an accommodation removes Mr. Pangalos from the ADA's protections and warranted judgment for Prudential. 29 C.F.R. § 1630.9(d); *Schmidt v. Methodist Hosp. of Ind., Inc.*, 89 F.3d 342, 344-45 (CA7 1996). Indeed, one of the district court's alternative grounds for granting summary judgment was the fact that "the accommodation offered by defendant is, as a matter of law, reasonable." D. Mem. & Order, attached as App. to Pet. at 8a.

By deliberately omitting this crucial fact that formed the basis of the decisions below, Counsel for Mr. Pangalos is improperly seeking this Court's review on an issue that simply is not raised by this case, namely whether Prudential had the burden of showing that it was unable to transfer Mr. Pangalos to another position. It is immaterial whether alternative accommodations, such as transfer, were available when it is uncontroverted that Mr. Pangalos rejected a reasonable accommodation that he had requested. By omitting this fact, counsel for Petitioner has wasted scarce judicial resources and forced Prudential to incur fees and costs in responding to this truly frivolous petition.

Mr. Pangalos' rejection of a reasonable accommodation is not the only important fact omitted from the petition. The petition attempts to show bad faith on the part of Prudential by suggesting that the Company ignored his requests for accommodation prior to 1995. What Petitioner fails to mention, however, is that he was out of work on short-term disability leave from late fall 1993 and throughout all of 1994. When he commenced the leave, Mr. Pangalos told his supervisor that he was "out sick" and the "doctors have told you I'm not coming back." Indeed, only employees who are certified as unable to work are eligible for short-term disability benefits. Therefore, it is not surprising that Prudential would not have discussed accommodations with Mr. Pangalos so long as he was unable to work. The record reflects that Prudential discussed accommodations issues with Mr. Pangalos, and even contacted vocational agencies specializing in ADA issues, just before his return to work. Thus, contrary to the

impression left by Petitioner's failure to discuss his disability leave, Prudential acted in good faith in attempting to accommodate Mr. Pangalos.[1/]

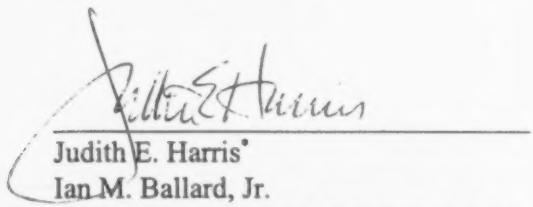
Finally, the instant petition also does not reveal the fact that Mr. Pangalos had purchased a home in Kentucky in April of 1994 and moved his family there shortly thereafter without notifying Prudential and without requesting a transfer before doing so. This critical fact makes not so surprising Mr. Pangalos' rejection of the mobile toilet facility for his job in Philadelphia and his insistence that he be provided instead with his dream accommodation, namely his very own Prudential sales office in Kentucky. It is dismaying that counsel for Petitioner would omit this fact when she was specifically chastised at oral argument by the Third Circuit Court of Appeals for excluding it from her brief submitted to that court.

The omission of these key facts renders the instant petition frivolous. Petitioner is impermissibly seeking this Court's review by attempting to transform this case by omission into something that it is not. While Respondent does not deny the right of Petitioner's counsel to present the facts in a light favorable for her client, these clear omissions of material facts completely misrepresent this case to this Court. Accordingly, this is one of those rare cases where damages and costs should be assessed against counsel for Petitioner pursuant to Supreme Court Rule 42.2.

1/ Prudential's good faith is further evidenced by the fact that it actively searched for alternative positions for him in its numerous field offices. Further, although Mr. Pangalos had relocated himself to Kentucky without notice, Prudential agreed to waive its transfer rules and allow him to seek employment with the Company in the Kentucky area. The Company also arranged for Mr. Pangalos to interview for a position in Lexington, Kentucky. All of these facts are noticeably absent from the petition as well.

Accordingly, Respondent respectfully requests that this Court assess damages and costs against counsel for Petitioner in the amount of $7454.49, as detailed in the affidavit of counsel attached as Exhibit A.

Respectfully submitted,



Judith E. Harris*
Ian M. Ballard, Jr.
MORGAN, LEWIS & BOCKIUS LLP
2000 One Logan Square
Philadelphia, PA 19103
Telephone: (215) 963-5028/5080

Counsel for Respondent

* Counsel of Record

Dated: October 28, 1997

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1997

No. 97-557

CHRISTOPHER PANGALOS,
Petitioner,

v.

PRUDENTIAL INSURANCE COMPANY OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

AFFIDAVIT OF JUDITH E. HARRIS

I, Judith E. Harris, hereby depose and say as follows:

1. I am a partner in the law firm of Morgan, Lewis & Bockius LLP, counsel for Respondent Prudential Insurance Company of America in the above-captioned matter.

2. On October 9, 1997, I wrote to counsel for Petitioner and requested that she withdraw the instant petition because its omission of material facts rendered it frivolous. A true and correct copy of my letter is attached as Exhibit 1. Counsel for Petitioner responded that she would not withdraw the petition. A true and correct copy of her letter is attached as Exhibit 2.

3. Because counsel for Petitioner has decided to pursue this frivolous petition, Prudential has incurred attorneys' fees and costs.

4. Exhibit 3 to this Affidavit itemizes the time spent on responding to the petition by me, an associate in my office, and two paralegals.

5. I am a 1970 graduate of Howard University Law School and have been a partner at Morgan, Lewis & Bockius LLP since 1994. My billing rate for this matter is $280.00 per hour. Mr. Ballard is a 1995 graduate of the University of Virginia School of Law and has been associated with Morgan, Lewis & Bockius LLP since 1996. Mr. Ballard's normal billing rate is $125 per hour. Lisa Hoffman and Amy DeSimone, two paralegals who worked on this matter, have billing rates of $105 and $95, respectively.

6. Mr. Ballard performed the majority of the work on this matter and his hours total 36.10. I supervised Mr. Ballard's work and spent 2.4 hours on this matter. Ms. Hoffman spent 1.9 hours on this matter and Ms. DeSimone spent 9.0 hours on this matter.

7. As itemized in Exhibit 3, the total legal fees incurred in responding to the petition to date are $ 6239.00.

8. Respondents have also incurred costs in responding to the petition, including telephone, facsimile, Westlaw research, duplicating and printing charges in the amount of $1215.49, as itemized in Exhibit 3.

9. Accordingly, Respondent respectfully requests reimbursement for attorneys' fees and costs in the amount of $ 7454.49.

I declare under penalty of perjury that the foregoing is true and correct.

Judith E. Harris

Executed: October 28, 1997

ALL STATE LEGAL 800-222-0510 E011 RECYCLED

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Morgan, Lewis
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COUNSELORS AT LAW

Judith E. Harris
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October 9, 1997

VIA TELECOPY

Donna E. Baker, Esquire
Larry Pitt & Associates
1918 Pine Street
Philadelphia, PA 19103

Re: Pangalos v. Prudential Insurance Co. of America

Dear Ms. Baker:

I am in receipt of the petition for writ of certiorari that you have filed with the United States Supreme Court in connection with the above-referenced matter. After careful review of your brief, I am writing to inform you that we consider the petition to be frivolous and, quite frankly, misleading. If you fail to withdraw the petition, we will seek damages and double costs for the filing of a frivolous petition under Supreme Court Rule 42.

The factual omissions in your petition are numerous. Most significantly, you fail to mention that Mr. Pangalos was in fact offered a reasonable accommodation -- mobile toilet facilities -- and that he rejected this offer. The legal issue of whether transfer to another position is required, and the related issue of which party bears the burden of identifying suitable positions, is immaterial if another reasonable accommodation has already been offered. Your omission of this key fact is very misleading.

You also do not disclose the fact that Mr. Pangalos was on disability leave beginning in December 1993 and throughout all of 1994. Nonetheless, you argue that Prudential was largely unresponsive to Mr. Pangalos during that period. Clearly, the fact that he was on disability leave is significant in determining whether the company's response was appropriate.

Finally, you fail to mention that Mr. Pangalos had purchased a home in Kentucky in April 1994 and moved his family there shortly thereafter. Frankly, I am amazed that you failed to present

this fact to the Supreme Court after one of the Third Circuit judges at oral argument clearly expressed his displeasure that he had to read Prudential's brief to learn this.

This letter is written only after careful thought and consideration. In my twenty-seven years of practice, I rarely have called an adversary's filings frivolous or misleading. In this case, however, I believe that the omissions are serious enough to seek sanctions under Rule 42. I hope you will carefully consider this matter and withdraw your petition. If I do not hear from you by October 13, 1997, I am afraid we will be forced to proceed as outlined above.

Sincerely,

Judith E. Harris

LARRY PITT & ASSOCIATES, P.C.
ATTORNEYS AT LAW

LARRY PITT * †
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October 10, 1997

Judith Harris, Esquire
Morgan, Lewis & Bockius
2000 One Logan Square
Philadelphia, PA 19103-6993

RE: **Christopher Pangalos v. Prudential Ins. Company of America**

Dear Ms. Harris:

In response to your letter of October 9, 1997, please be advised that I am in disagreement with your assessment of the merit of the Petition for Writ of Certiorari. The Petition for Writ of Certiorari is not frivolous. The Petition, including the attached Appendix, contains all relevant facts necessary for the Supreme Court to render a decision on the Question Presented for Review.

The Petition for Writ of Certiorari will not be withdrawn. Should you elect to file a submission seeking recovery of damages and costs under Rules 42 and 43, such submission would be similarly subject to an application by Petitioner for relief under Rule 42.

Very truly yours,

Donna E. Baker

Donna E. Baker, Esquire

DB/cd

ALL-STATE® LEGAL 800-222-0510 EDIT RECYCLED

3

October 28, 1997
Re: Pangalos v. Prudential Insurance Company, No. 96-CV-0167, E.D. PA.

Detail for Fee Services Rendered

Date	Name	Description	Hours	Amount
09/30/97	Harris, J.E.	Review of Petition for Writ of Certiorari to U. S. Supreme Court; telephone message to Donna McCarthy; conference with M. Ballard.	.90	252.00
09/30/97	Ballard, I.M.	Conference in office with J. E. Harris re Supreme Court brief; telephone call to Supreme Court's clerk's office	.40	50.00
10/05/97	Ballard, I.M.	Review plaintiff's Supreme Court brief	.70	87.50
10/07/97	Ballard, I.M.	Research issues for Supreme Court brief	1.90	237.50
10/08/97	Ballard, I.M.	Research issues for Supreme Court brief; draft letter to Donna Baker	3.50	437.50
10/09/97	Harris, J.E.	Review of letter to plaintiff's counsel regarding sanctions; discussion of same with Donna McCarthy; letter to Donna Baker.	.20	56.00
10/09/97	Ballard, I.M.	Review file; conference in office with J. E. Harris re letter to Donna Baker	.30	37.50
10/10/97	Ballard, I.M.	Research issues for Supreme Court brief	1.10	137.50
10/12/97	Ballard, I.M.	Research issues for Supreme Court brief	1.50	187.50
10/13/97	Hoffman, L.W.	Telephone conversation with Third Circuit regarding transcription of Oral Argument; telephone conversations with I. Ballard regarding same (2).	.30	31.50

10/13/97	Ballard, I.M.	Draft Supreme Court brief; review Supreme Court rules; research Supreme Court Rule 42.2 sanctions cases; conference in office with J. E. Harris re brief and plaintiff's response to J. E. Harris' letter	6.90	862.50
10/14/97	Hoffman, L.W.	Telephone conversations with Ruffin (Third Circuit Court Clerk) regarding transcript of Oral Argument (2); conferences with J. Harris, I. Ballard regarding same.	.30	31.50
10/14/97	Ballard, I.M.	Draft Supreme Court brief	5.60	700.00
10/15/97	Hoffman, L.W.	Prepare correspondence to Ruffin (Third Circuit Clerk) regarding request for Oral Argument tape.	.40	42.00
10/15/97	Harris, J.E.	Review of Brief in Opposition To Certiorari.	.90	252.00
10/16/97	Hoffman, L.W.	Conference with I. Ballard regarding typesetting schedule; legal research regarding Brief in Opposition to Petition for Certiorari; conference with A. DeSimone regarding finalizing brief to go to printer; prepare correspondence to Ruffin regarding oral argument tape.	.90	94.50
10/16/97	Ballard, I.M.	Revise Supreme Court brief; conference in office with L. Hoffman re edits and printing requirements	.70	87.50
10/16/97	DeSimone, A.C.	Proofread Respondent's Brief in Opposition; review Supreme Court Rules regarding same; conference with M. Ballard regarding same.	1.90	180.50
10/17/97	Ballard, I.M.	Draft Supreme Court motion for damages and costs.	1.60	200.00
10/17/97	DeSimone, A.C.	Conference with M. Ballard regarding edits to Respondent's brief.	.20	19.00
10/19/97	Ballard, I.M.	Draft Motion for damages and costs.	1.60	200.00
10/20/97	Harris, J.E.	Telephone conference with Donna McCarthy regarding brief in opposition and motion regarding sanctions; review of Petition for Damages and Costs; revisions to same.	.40	112.00
10/20/97	Ballard, I.M.	Draft motion for damages and costs; prepare attorneys' fees affidavit;	3.40	425.00

		revise brief in opposition to petition for certiorari; prepare certificate of service; revise motion for damages		
10/20/97	DeSimone, A.C.	Research Respondent's brief regarding revisions; telephone discussion with Packard Press regarding type setting brief; prepare table of contents and table of authorities regarding same.	3.10	294.50
10/21/97	Ballard, I.M.	Revise motion for damages and costs; prepare exhibits for same; telephone call to Donna B. McCarthy re Rule 29.1 statement	1.00	125.00
10/21/97	DeSimone, A.C.	Proofread Respondent's Motion for Damages and Costs pursuant to Rule 42.2 and Affidavit of J. Harris.	1.20	114.00
10/22/97	Ballard, I.M.	Revise motion for damages; revise brief in opposition to certiorari	.60	75.00
10/22/97	DeSimone, A.C.	Conference with M. Ballard regarding status of Respondent's brief in opposition.	.20	19.00
10/23/97	Ballard, I.M.	Conference in office with Amy DeSimone re submission of brief to printer; review Supreme Court rules re service; conference in office with J. E. Harris re Rule 29.1 disclosure	.50	62.50
10/23/97	DeSimone, A.C.	Telephone conversation with Packard Press regarding typesetting Respondent's Brief in Opposition; prepare package regarding same.	.60	57.00
10/24/97	Ballard, I.M.	Review draft of opposition brief from printer; arrange for transcription of 3d circuit oral argument	1.90	237.50
10/24/97	DeSimone, A.C.	Review typeset version of Respondent's brief in opposition; Conference in office with M. Ballard regarding same; telephone conversation with L. Barth at Packard Press regarding additional revisions.	1.80	171.00
10/26/97	Ballard, I.M.	Review and revise 3d circuit oral argument transcript from audio tape	2.90	362.50
		Matter Total	49.40	$6,239.00

October 28, 1997
Re: Pangalos v. Prudential Insurance Company, No. 96-CV-0167, E.D. PA.

Summary of Disbursements and Other Related Charges Incurred on Your Behalf

Description	Amount
Telephone/Fax	9.32
Duplicating	41.64
Computer Legal Research	306.53
Printing Costs	858.00
Total	$1215.49